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NIGHT DEPOSITORY

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FILED  
S. KELBAUGH

DEPUTY CLERK

IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

Division 6

STATE'S RESPONSE TO DEFENDANT'S  
MOTION TO PRECLUDE LATE  
DISCLOSED EVIDENCE DATED AND  
FILED MARCH 10, 2010.

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby submits its Response to Defendant's Motion to Preclude Late Disclosed Evidence dated and filed March 10, 2010, and asks that the Motion be denied. The State's position is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

The touchstone for Arizona rules of disclosure in criminal addressing the issue of sanctions clearly state:

"Rule 15.7 of the Arizona Rules of Criminal Procedure authorize the trial court to sanction a party who does not timely disclose material relevant to the case. *If a sanction is warranted, it should have minimal effect on the evidence and the merits of the case. Precluding evidence is rarely the appropriate sanction.*"

See also *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996) (emphasis added).

1 Once a criminal case begins, the parties have a continuing duty to make additional  
2 disclosure pursuant to Rule 15.6. The State has fulfilled its duty faithfully under this rule. Rule  
3 15.6(d) allows final disclosure to be completed seven (7) days prior to trial unless otherwise  
4 permitted by the court. Despite the clarity of the disclosure rules and the specific intent of this  
5 Court's June 3, 2009 order, the defense team nevertheless keeps pushing this court for a myriad  
6 of sanctions based upon their self-declared disclosure violations which the State vehemently  
7 denies.  
8

9 "Before sanctioning the offering party, the court should consider (1) the importance of  
10 the evidence to the prosecutor's case, (2) surprise or prejudice to the defendant, (3) prosecutorial  
11 bad faith, and (4) other relevant circumstances." *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d  
12 290, 308 (1996)(citing *Smith, supra* at 358-359, 681 P.2d at 1377-1378). "Prohibiting the  
13 calling of a witness should be invoked only in those cases where other less stringent sanctions  
14 are not applicable to effect the ends of justice." *Smith, supra* at 359, 681 P.2d at 1378. See also  
15 *Towery, supra*. ("Precluding evidence is rarely an appropriate sanction.")  
16

17 Rule 15.7, Ariz. R. Crim. P., authorizes a trial court to impose sanctions if a party does  
18 not timely disclose material relevant to the case. "The trial court, however, should seek to apply  
19 sanctions that affect the evidence at trial and the merits of the case as little as possible, since the  
20 rules of Criminal Procedure are designed to implement, and not to impede, the fair and speedy  
21 determination of cases." *State v. Smith*, 140 Ariz. 355, 359, 681 P.2d 1374, 1378 (1984)(quoting  
22 *State v. (Joseph Clarence, Jr.) Smith*, 123 Ariz. 243, 252, 599 P.2d 199, 208 (1979).  
23

24 ***I. Subpoena Returns for JP Morgan Chase Account ending in 2663, Chase Bank***  
25 ***Account ending in 9408, and UBS Resource Account ending in 6347.***

26 On multiple occasions the State has acknowledged that investigation in this case is  
on-going. That includes a very thorough review of Defendant's financial records. In many

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1 instances, there has been confusion regarding accounts due to Defendant's practice of  
2 opening new credit card accounts with balance transfers from an existing account or simply  
3 transferring an existing balance to another line of credit to obtain a more favorable interest  
4 rate or to delay payments. It has often been the case that no sooner than the State believes it  
5 has a "string" to a particular time frame/account that it learns that the information sought  
6 either originated in a different time frame and/or is held by a different financial institution.  
7 Admittedly, the State could have pursued a different tactic. It could have asked for all  
8 records for all accounts for an extended period of time. While in hindsight, it now seems this  
9 may have been a far more expeditious strategy, it would have also been equally troublesome  
10 due to the "fishing expedition" nature of such broad unfocused subpoenas.  
11

12         The need for multiple subpoenas has also been caused by the financial institution's  
13 inability or unwillingness to provide correct contact information or complete records. For  
14 example, in just the past week the State learned that a subpoena issued in mid-February,  
15 which was sent to the exact address provided by the financial institution, was sent to the  
16 wrong address. A new subpoena has been issued along with an urgent request to expedite the  
17 return. Regarding the completeness of the records, it has not been uncommon for a return to  
18 be received and even before the data is fully reviewed, the need for additional information  
19 becomes apparent. While this motion addresses only the information received for a few  
20 accounts, additional returns from other financial institution are expected to be received in the  
21 next few weeks as well.  
22

23  
24         The State does not concede a disclosure violation has occurred, but if one has, a  
25 preclusion sanction is clearly not warranted. The thorough and exhaustive review of  
26 Defendant's financial records has uncovered valuable information. So far the State has found

1 evidence that Defendant purchased a pair of hiking-type shoes similar to those that left the  
2 impressions outside Carol's home. The financial records have also revealed that Defendant  
3 purchased a Calloway #7 Big Bertha Steelhead III. The cover designed for this club, which  
4 was photographed in Defendant's garage the day after Carol's murder but disappeared hours  
5 later, was ultimately found in Mr. Sears' possession. This is the club the State believes  
6 Defendant used as a weapon to beat Carol to death.

7  
8 The State cannot say, with any specificity, how many more subpoenas may be issued;  
9 however, this type of information has proven to be extremely critical to the State's case and  
10 any sanction that would effectively suppress it would have devastatingly negative affect on the  
11 merits of the State's case.

12 The State commiserates with Defendant regarding the time left to review these  
13 records before trial. The defense and prosecution are literally in the same boat regarding  
14 time constraints; however, only a Defendant can request a continuance of this trial.

15  
16 **II. *Girard's phone records.***

17 In mid 2009, Mr. Sears received an anonymous e-mail regarding the murder of Carol  
18 Kennedy. The e-mail implicated James Knapp in Carol's death, alleging that Mr. Knapp was  
19 involved in a prescription drug ring and Carol had been murdered as a result of Knapp's  
20 dealings. No further communication from this individual has been forthcoming.

21 The State believes this e-mail was created and sent by a person who supports  
22 Defendant in attempt to divert suspicion from him. Law enforcement discovered that the e-  
23 mail had been sent from an internet café in the Paradise Valley area. The elapsed time from  
24 when the e-mail was sent to when the investigation began was sufficient a span of time as to  
25 allow any other electronic history of the email to be lost. Ms. Girard's phone records were  
26

1 subpoenaed in an attempt to learn if she sent or received any calls from the area from which  
2 the e-mail was sent.

3 **III. Outdoor Pro-Link Information and Request to FBI.**

4 Although this information is relatively new, the defense team began launching attacks  
5 nearly immediately in an attempt to preclude or suppress the evidence. This is not  
6 unexpected given its inculpatory nature and value to the State's case. Defendant has  
7 certainly recognized its importance; this Court should as well.

8  
9 La Sportiva shoes are not common; only four stores in all of Arizona sell this brand of  
10 shoe. The Pike's Peak model is no longer available through typical retailers and Detective  
11 McDormett was informed that only 3800 pairs of the Pike's Peak model were sold in all of  
12 North America. The fact that Defendant purchased a pair of these shoes and that it appears that  
13 this type of shoe "closely correspond with" the impressions left outside Carol's home is  
14 pivotal. Any sanction that would effectively suppress this evidence would have devastatingly  
15 negative affect on the merits of the State's case.

16  
17 Mr. Gilkerson has not yet issued a supplemental report on any recent examinations.  
18 The moment one is received, it will be disclosed. As the State indicated on numerous  
19 occasions, this is new evidence. Disclosure as allowed pursuant to *Ariz. R. Crim. P.*, Rule  
20 15.6(a). Defendant's request to preclude this evidence should be denied.

21 **IV. E-mails Between Defendant and Cheryl Hatzopoulos**

22  
23 Information regarding the property on Country Club Drive that Defendant rented after  
24 Carol's murder was disclosed very early on. The information recently disclosed was in the  
25 possession of a detective who has had little involvement in this case since relatively early on.  
26 The information cannot be a surprise to Defendant. He both sent and/or received the e-mails.

1 **CONCLUSION:**

2 Defendant's unrelenting and overstated complaints regarding the State's alleged failure  
3 to comply with Rule 15 must be taken in proper context. The defense team has made it their  
4 mission to complain and cry foul each and every time an issue is not addressed to their  
5 satisfaction. Moreover, the negative comments made by the defense are little more than  
6 undeserved acrimonious rhetoric. Again, the State asks the Court to separate the exaggerated  
7 accusations from reality, to not be unduly swayed by what amounts to be pejorative  
8 accusations regarding the State's disclosure habits in this case, and deny the latest Motion to  
9 Preclude Evidence.  
10

11 RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of March, 2010.

12  
13 Sheila Sullivan Polk  
14 YAVAPAI COUNTY ATTORNEY

15  
16 By: Dennis M. M. Zane  
17 Joseph C. Butner  
18 Deputy County Attorney

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COPIES of the foregoing delivered this  
22nd day of March, 2010 to:

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